Koh Boh Huat & Ors v Tan Niam Neo & Anor

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO MT1–24–119 OF 2005
LOW HOP BING J
7 APRIL 2006

Land Law — Sale of land — Order for — Termination of co-proprietorship through sale of land — Objection by minority co-proprietors — Whether court had power to order sale — National Land Code 1965 s 141 & 145 — Courts of Judicature Act 1964 Schedule para 3

The plaintiffs and the defendants were the registered co-proprietors of a piece of land ('the land') which had been left idle. In 2004, a developer company approached the plaintiffs with a proposal to develop the land, to which a majority of the co-proprietors holding 9/10 undivided share had agreed. However, the defendants who jointly own the rest, ie 1/10 undivided share had without any reasonable grounds objected to the proposal. With a view to an amicable settlement, the developer suggested that the land be partitioned, to which the defendants had also disagreed, again without any reasonable grounds. Subsequently, the plaintiffs who were quite advanced in age instructed their solicitors to notify the defendants vide letter dated 25 August 2004 of the plaintiffs' intention to sell the land at the price of RM13.80 per sq ft by way of an order of the court, as a practical settlement whereby the proceeds of sale shall be apportioned in accordance with the respective undivided shares of the co-proprietors who would not be prejudiced thereby. Therefore, the plaintiffs sought an order that: (1) the plaintiffs be permitted to sell in a public auction the land at the price of RM13.80 per sq ft; and (2) the defendants and all those claiming through and under them do deliver vacant possession thereof to the purchaser.

Held, allowing the plaintiffs' application:

Since under s 141 of the National Land Code 1965, any proposal to partition the land by the plaintiffs as co-proprietors holding 9/10 undivided majority share was not possible as the subdivided portions would be less than the required two-fifths (0.4) of a hectare, it was necessary for the plaintiffs as majority co-proprietors to invoke s 145 which confers upon the court the power to facilitate termination of the co-proprietorship (see para 13–14). Furthermore, para 3 of the Schedule to the Courts of Judicature Act 1964 sets out the power to direct a sale instead of partition in any action for partition of land; and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold, and to give all necessary and consequential directions (see para 18); *KK Kumaran v TS Sambanthamurthi* [1996] 3 MLJ 309; *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1998] 1 CLJ 169; and *Yong Hin Seong & Anor v Yong Teik Seong* [2003] 6 MLJ 38 followed.

[Bahasa Malaysia summary

Plaintif-plaintif dan defendan-defendan adalah tuanpunya bersama yang berdaftar untuk sebidang tanah ('tanah tersebut') di mana yang telah dibiarkan begitu sahaja. Pada tahun 2004, satu syarikat pemaju telah mendekati plaintif dengan satu usul untuk memajukan tanah, di mana majoriti tuan punya bersama yang berdaftar memegang 9/10 bahagian yang belum dibahagikan telah bersetuju. Walau bagaimanapun, defendan-defendan yang secara bersama memegang yang selainnya (iaitu 1/10 bahagian yang belum dibahagikan telah tanpa alasan-alasan munasabah membantah usul tersebut. Dengan satu penyelesaian yang munasabah, pemaju telah mencadangkan bahawa tanah tersebut perlu dibahagikan, di mana, defendan-defendan tidak bersetuju, dengan sekali lagi tanpa alasan-alasan munasabah. Kemudiannya, plaintif-plaintif yang berumur telah mengarahkan peguam mereka untuk memberitahu defendan-defendan melalui surat bertarikh 25 Ogos 2004 tentang niat plaintif-planitif untuk menjual tanah pada harga RM13.80 kaki persegi melalui satu perintah mahkamah sebagai satu penyelesaian praktikal di mana hasil jualan hendaklah dibahagikan mengikut bahagian tuanpunya bersama pendaftar yang belum dibahagikan tidak diprejudiskan. Oleh itu, plaintif-plaintif telah memohon satu perintah bahawa: (1) plaintif-plaintif dibenarkan menjual dalam satu lelongan awam tanah pada harga RM13.80 kaki persegi; dan (2) defendan-defendan dan kesemua yang menuntut melalui dan di bawah mereka untuk mennyerahkan milikan kosong kepada pembeli.

Diputuskan, membenarkan permohonan plaintif:

Memandangkan s 141 Kanun Tanah Negara 1965, sebarang usul untuk membahagikan tanah oleh plaintif sebagai tuanpunya bersama memegang 9/10 bahagian yang belum dibahagikan adalah mustahil kerana bahagian-bahagian tanah adalah kurang daripada 2/5 (0.4) hektar yang ditetapkan, ia perlu bagi plaintif-plaintif sebagai majoriti tuanpunya bersama untuk menggunakan s 145 yang memberikan kuasa kepada mahkamah untuk melaksanakan pembatalan pendaftaran ketuanpunyaan bersama (lihat perenggan 13–14). Lagipun, perenggan 3 Jadual kepada Akta Mahkamah Kehakiman 1964 memberi kuasa untuk mengarahkan jualan dan bukan bahagian dalam mana-mana tindakan untuk pembahagian tanah tersebut, dan dalam sebarang perkara berkenaan tanah, di mana adalah kelihatan perlu dan segera, untuk mengarahkan jualan tanah atau mana-mana bahagian daripadanya dijual, dan untuk memberi sebarang yang perlu dan berbangkit (lihat perenggan 18); *KK Kumaran v TS Sambanthamurthi* [1996] 3 MLJ 309 *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1998] 1 CLJ 169 dan *Yeong Hin Seong & Anor v Yong Teik Seong* [2003] 6 MLJ 38 diikut.]

Notes

For cases on order for sale, see 8(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4131–4234.

Cases referred to

KK Kumaran v TS Sambanthamurthi [1996] 3 MLJ 309 (refd)

Majlis Peguam & Anor v Tan Sri Dato Mohamed Yusoff bin Mohamed [1997] 2 MLJ 271 (refd)
President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd [1998] 1 CLJ 169 (refd)
Yong Hin Seong & Anor v Yong Teik Seong [2003] 6 MLJ 38 (refd)

Legislation referred to
Courts of Judicature Act 1964 s 25(2) sch 3
National Land Code 1965 ss 51(2)(c), 53(2)
Rules of the High Court 1980 O 31

Kesavan P Krishnan (Kesavan & Associates) for the plaintiffs.
Defendants in person.

Low Hop Bing J:

APPLICATION

[1] By way of originating summons in encl (1), the plaintiffs seek an order that:

(1) the plaintiffs be permitted to sell in a public auction the country land having an area of 1.687 hectares held under Lot No 15083, Grant No 25499 in the mukim of Batu Berendam, District of Melaka Tengah ('the land') at the price of RM13,80 per sq ft;

(2) the defendants and all those claiming through and under them do deliver vacant possession thereof to the purchaser;

(3) the date of the auction be fixed within one month of this order to be followed by consequential directions by the registrar of this court; and

(4) costs of this application and sale be borne and paid by the defendants to the plaintiffs.

FACTUAL BACKGROUND

[2] This does not appear to be disputed.

[3] The plaintiffs and the defendants are registered co-proprietors of the land which have been left idle.

[4] In 2004, a developer company approached the plaintiffs with a proposal to develop the land, to which a majority of the co-proprietors holding 9/10 undivided share have agreed. However, the defendants who jointly own the rest ie 1/10 undivided share have without any reasonable grounds objected to the proposal.

[5] With a view to an amicable settlement, the developer suggested that the land be partitioned, to which the defendants had also disagreed, again without any reasonable grounds.

[6] Subsequently, the plaintiffs who are quite advanced in age instructed their solicitors to notify the defendants vide letter dated 25 August 2004 of the plaintiffs' intention to sell the land at the price of RM13.80 per sq ft by way of an order of the court, as a practical settlement whereby the proceeds of sale shall be apportioned in accordance with the respective undivided shares of the co-proprietors who would not be prejudiced thereby.

TERMINATION OF CO-PROPRIETORSHIP

[7] Learned counsel Datuk Kesavan P Krishnan relied on s 145 of the National Land Code 1965 and s 25(2) of the Courts of Judicature Act 1964 and para 3 in the schedule thereto in support of the termination of the co-proprietorship by way of sale and distribution of the nett proceeds thereof. In addition, he cited the following authorities:

(1) *KK Kumaran v TS Sambanthamurthi* [1996] 3 MLJ 309

(2) *President Shoes Sdn Bhd v Macci Fashion Centre Sdn Bhd* [1998] 1 CLJ 169

(3) *Yeong Hin Seong & Anor v Yong Teik Seong* [2003] 6 MLJ 38

(4) *Majlis Peguam & Anor v Tan Sri Dato Mohamed Yusoff bin Mohamed* [1997] 2 MLJ 271.

[8] The defendants were unrepresented and being absent did not or decline to offer any submission in reply.

[9] Be that as it may, in view of the immensely important issue raised in relation to the order sought herein, I consider it necessary and appropriate to set out my judgment in full so that the parties herein would have the benefit of knowing the grounds leading to the orders to be made in this subject matter.

[10] The land being country land is subject to an implied condition that it shall be used for agricultural purposes only: see s 51(2)(c) and s 53(2) of the National Land Code 1965.

[11] Under s 136(l)(f) thereof, the area of any sub-divisional portion of land subject to the 'agriculture' category or to any condition requiring its use for an agricultural purpose, shall not be less than two-fifths of a hectare.

[12] As the area of the land is 1.687 hectares, a partition of it would give each of the plaintiffs 0.1687 hectare while each defendant would be entitled to 0.08435 hectare only.

[13] Hence, under s 141 thereof, any proposal to partition the land by the plaintiffs as co-proprietors holding 9/10 undivided majority share is not possible as the subdivided portions will be less than the required two-fifths (0.4) of a hectare.

[14] Given the above facts, it is necessary for the plaintiffs as majority co-proprietors to invoke s 145 thereof which confers upon the court the power to facilitate termination of the co-proprietorship in the following words:

> 145 Power of Court to facilitate termination of co-proprietorship
>
> (1) Where, in the case of any land vested in co-proprietors
>
> (a) any of the co-proprietors will neither join in, nor consent to the making of, an application for partition under this Chapter, or
>
> (b) by reason of the operation of para (f) of sub-section (1); of s 136 (as applied by s 141), partition of the land between all of the co -proprietors is incapable of being approved under this Chapter,
>
> the court, subject to and in accordance with the provisions of any law for the time being in force relating to civil procedure, may, on the application of any of the co-proprietors, make such order as it may think just for the purpose of enabling the co-proprietorship to be terminated.
>
> (2) Without prejudice to the generality of the power conferred by sub-s (1), the court may on any application under that sub-s order:
>
> (a) that, subject to the making between the co-proprietors of such payments as the court may consider equitable having regard to the comparative values of the individual portions thereby proposed, any application for partition made by one or more of the co-proprietors in the terms specified in the order shall be deemed for the purposes of this Chapter to have been made by them all;
>
> (b) that the undivided share of any of the co-proprietors be transferred on the terms specified in the order to the other co-proprietors, or to any of them; or
>
> (c) that the land be sold

[15] In exercise of the power under s 145(1), the court is to act in accordance with the provisions of any law for the time being in force relating to civil procedure, which in this context may be found in the Rules of the High Court 1980.

[16] Section 145(2) thereof confers upon the court the power to make the specific orders enumerated thereunder. Specifically, para (a) enables the court to make an order for partition if partition is permissible. As alluded to above, partition is not permissible and so the court would move on to para (b) or (c) thereunder. The plaintiff has not sought an order for the transfer of the undivided shares from any of the co-proprietors to the other co-proprietors. Hence, para (b) may be excluded from consideration.

[17] Paragraph (c) has been invoked by the plaintiffs for the purpose of obtaining an order that the land be sold on the terms as specified at the outset of this judgment.

[18] Section 145(1) and (2)(c) thereof must be read conjunctively with s 25 of the Courts of Judicature Act 1964 which provides for the general powers of the High Court which were vested in it immediately prior to Malaysia Day and such other powers as may be vested in it by any written law in force within its local jurisdiction while s 25(2) confers on the High Court additional powers set out in the schedule

thereto, exercisable in accordance with any written law or rules of court relating to the same. Paragraph 3 of the schedule to the Courts of Judicature Act 1964 sets out the power to direct a sale instead of partition in any action for partition of land and in any cause or matter relating to land, where it appears necessary or expedient, to order the land or any part thereof to be sold and to give all necessary and consequential directions.

[19] Section 145 and s 25 came up for judicial consideration in *KK Kumaran*, where the issue was whether the court had jurisdiction to order the sale of land against the wishes of the registered proprietor, by public auction to realise the plaintiff's claim for an undivided share therein for which the plaintiff had paid a sum of RM15,000. The plaintiff alleged that the defendant had given him the impression that the land would be subdivided. James Foong J (now JCA) held, inter alia, that s 25(1) gives the High Court jurisdiction to deal with all matters conferred by law, including those vested prior to the formation of Malaysia, while s 25(2) gives the court additional powers which include para 3 of the schedule thereto which allows the court to direct sale in any cause or matter relating to land. Order 31 of the Rules of the High Court 1980 was invoked.

[20] In *President Shoes Sdn Bhd*, both plaintiff and defendant were co-wners of two pieces of property pursuant to a lease agreement, the defendant expressed its intention to exercise its option to purchase the plaintiff's half share. The plaintiff agreed but the defendant made no further moves. Kamalanathan Ratnam JC (later J) allowed the plaintiff's application, also under O 31 to sell the property by public auction and for the proceeds thereof to be distributed equally between the parties and for other consequential orders, on the basis of s 145 and s 25.

[21] The above two authorities were followed by Abdul Malik Ishak J in *Yong Hin Seong* where the plaintiffs and defendant are brothers who were registered joint owners of a flat in Kuala Lumpur over which they had an impasse. The plaintiffs sought to resolve it by seeking an order for sale of the property by way of public auction and for equal distribution of the proceeds of sale, on the basis of s 25(1), (2) and O 31.

[22] I am of the view that the above three judgments are well considered and would respectfully follow them.

CONCLUSION

[23] On the foregoing grounds, I allow the plaintiffs' application in encl 1 and make an order in terms as set out in the commencement of this judgment.

Plaintiffs' application allowed.

Reported by Loo Lai Mee